Phoenix Pipe & Tube, L.P. d/b/a Phoenix Pipe and Tube Company, a Partnership Composed of 1st P.S.C. Corporation, Blue Pearl Associates, Inc., Red Linden Corporation, Blue Linden Corporation and Phoenixville Steel Corporation *and* United Steelworkers of America, AFL–CIO, CLC. Case 4–CA–17378

March 20, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On September 19, 1989, Administrative Law Judge Peter E. Donnelly issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, as modified below, and conclusions and to adopt the recommended Order.

1. In excepting to the judge's finding that the Respondent is the successor to Phoenix Steel, the Respondent argues, inter alia, that differences in job classifications and requirements defeat the essential element of continuity of the enterprise. We agree with the judge, however, that notwithstanding the Respondent's transformation of numerous craft and noncraft classifications into four basic pay groups the evidence showed that at the relevant time—on May 2, 1988, when the Respondent commenced operations with a representative complement of employees and when a union demand for recognition was pending—most employees continued to spend most of their day performing the same tasks and using the same skills they had used in their work for the predecessor.[1] As the Respondent's chief operating official acknowledged, it was in the Respondent's ''best interests,'' at least at the outset, ''to put the best operator doing what he knows best right now.'' When employees continue doing substantially the same work that they did for a predecessor, we will not find that the addition of some new job duties is likely to change their attitude towards their job to such an extent as to defeat a finding of continuity of the enterprise. *USG Acoustical Products*, 286 NLRB 1, 9–10 (1987). See also *Systems Management v. NLRB*, 901 F.2d 297 (3d Cir. 1990) (change from full-time to part-time positions does not show lack of continuity). We similarly find no merit in the Respondent's reliance on the reduced size of its operations in comparison to that of the predecessor. *Roanwell Corp.*, 293 NLRB 20 (1989); *Lloyd Flanders*, 280 NLRB 1216, 1218–1219 (1986). Such diminution in size does not defeat the employees' expectations of continued representation by their union. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 46 fn. 11 (1987).

Finally, the Respondent's contentions concerning what the future might hold for employees if all its cross-training plans are carried out is simply too speculative a basis for finding substantial changes in employee attitudes towards union representation at the time as of which successorship is to be determined. See *USG Acoustical Products*, supra.

2. In adopting the judge's finding that the Respondent lacked a good-faith doubt that a majority of the unit employees supported the Union, we rely solely on the fact that, assuming arguendo, the statements of 24 employees to various of the Respondent's managers were a clear repudiation of the Union, this does not constitute a majority of the unit.[2]

3. We agree with the judge that the petition signed by 34 unit employees, and presented to the Respondent around May 12, 1988, cannot serve as the basis for good-faith doubt. By its express terms, the petition requested the right to vote for or against a union shop—it did not unequivocally repudiate the Union. See *Destileria Serralles, Inc.*, 882 F.2d 19, 21 (1st Cir. 1989). See also *Bryan Memorial Hospital*, 279 NLRB 222, 225 (1986), enfd. 814 F.2d 1259 (8th Cir. 1987), cert. denied 484 U.S. 849 (1987) (affidavits from several employees that a majority of employees do not

[1] Additional duties performed by craft employees included some cleaning and painting in their work areas during the 20 percent or less of their worktime when steel pipe and tube is not being produced.

[2] On May 16, when the Respondent denied the Union's recognition request, there were 54 production and maintenance employees.

In finding that the statements by the 24 employees did not provide a sufficient objective basis for doubting the Union's majority status, Chairman Stephens does not rely solely on the fact that the 24 constituted less than a majority of the unit. See *NLRB v. Curtin Matheson Scientific*, 110 S.Ct. 1542, 1550 fn. 8 (1990). He also relies on the judge's finding that the comments of at least 15 of the 24 employees were insufficiently specific to demonstrate a clear repudiation of union representation. Moreover, he finds that the statements of 9 of those 15 (employees Rogala, Zuniga, Moore, Browne, Kucharick, Dellaquila, Foreman, King, and Bradshaw) were unreliable on other grounds as indicators of their sentiments. Their statements were made during and after employment interviews in which they were told by the Respondent's manager/interviewers that the Respondent would be opening the plant on a nonunion basis. While Chairman Stephens acknowledges that the Respondent's managers did not, like the interviewers in *Middleboro Fire Apparatus*, 234 NLRB 888, 894 (1978), enfd. 590 F.2d 4 (1st Cir. 1978), tell employees that the Respondent had ''no obligation to recognize anybody,'' the managers' comments nonetheless supplied a context that cannot be overlooked. An employee who wants a secure job at a plant that, he is told, is opening ''nonunion'' might well think it in his interest to make it clear, as did such employees as Zuniga and Browne, that this is acceptable to him and he does not need a union. Under the circumstances here, this is a far cry from a forthright rejection of union representation. The shutdown of the employees' former employer and their uncertainties concerning the possible attitudes of the new one (the Respondent) could reasonably be expected to dissuade them from making statements favorable to unions for fear of jeopardizing their chances for employment. See *Fall River Dyeing Corp. v. NLRB*, supra, 482 U.S. at 40.

want the union or want a new election fail to establish that a majority no longer want representation).[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Phoenix Pipe & Tube, L.P. d/b/a Phoenix Pipe and Tube Company, a partnership composed of 1st P.S.C. Corporation, Blue Pearl Associates, Inc., Red Linden Corporation, Blue Linden Corporation, and Phoenixville Steel Corporation, Phoenixville, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[3] This is unlike the employee letters in *AMBAC International*, 299 NLRB 505 (1990), in which one-half of the bargaining unit employees stated, not that they wanted to decide at some future point whether they did or did not want a union, but that they wanted to bargain directly with the employer ''not through a third party, presently Local 112, IFPTE.'' In AMBAC International, we found that such statements clearly invited direct negotiations with the employees, thus repudiating the union's role as exclusive bargaining representative and indicating that the employees did not want the union to represent them. Here, by contrast, the employee petition ambiguously refers only to the ''right to vote for or against a union shop.'' It does not indicate a clear intention by the employees not to be represented by the Union. For these reasons, we also find the employee petitions in *Bil-Mar Foods*, 286 NLRB 786, 795–796 (1987); and *Industrial Waste Service*, 268 NLRB 1180, 1186 (1984), which were relied on in fn. 7 of *AMBAC International*, to be inapposite because in those petitions the employees also conveyed the clear impression that they no longer wanted union representation.

Scott Thompson, Esq., for the General Counsel.
Howard R. Flaxman, Esq., of Philadelphia, Pennsylvania, for Respondent.
Richard W. Rosenblitt, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. The charge here was filed on May 19, 1988, by United Steelworkers of America, AFL–CIO, CLC (Union or Charging Party). A complaint and notice of hearing issued on July 29, 1988, amended on December 2, 1988, alleging that Phoenix Pipe & Tube, L.P. d/b/a Phoenix Pipe and Tube Company, a partnership composed of 1st P.S.C. Corporation, Blue Pearl Associates, Inc., Red Linden Corporation, Blue Linden Corporation and Phoenixville Steel Corporation (Company or Respondent) refused to bargain with the Charging Party in violation of Section 8(a)(5) of the Act. Answers were timely filed by Respondent to the effect that Respondent was not obligated to bargain with the Union; first, because it was not a legal successor corporation and, secondly, even assuming that it were, it had a good-faith doubt based on objective considerations that the Union represented a majority of its employees.

Pursuant to notice, a hearing was held before me on December 12 and 13, 1988. Briefs have been timely filed by the General Counsel, Charging Party, and Respondent, which have been considered.

No objections thereto having been filed, the General Counsel's motion to correct transcript is granted.

FINDINGS OF FACT

I. THE EMPLOYER

Employer is a Delaware limited partnership engaged in the manufacture of steel, pipe, and tube at its plant and principal place of business in Phoenixville, Pennsylvania. Based on a projection of its operation since or about May 2, 1988, at which time it commenced operations, the Employer, in the course and conduct of its business operations described above, will sell and ship from its plant at Phoenixville, Pennsylvania products, goods, and materials valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania. The complaint alleges, the answer admits, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. Successorship

Phoenix Steel Corporation (Phoenix Steel) operated for many years a steel producing plant at Phoenixville, Pennsylvania. In earlier years, Phoenix Steel had engaged in other steel producing operations but, since 1982, was engaged exclusively in the production of steel pipe and tube until it ceased production on March 31, 1987. When it closed, approximately 8 percent of Phoenix Steel's production was carbon-based pipe and tube, a product that does not require heat treating.[1]

During the last approximately 40 years of its existence, the production and maintenance employees of Phoenix Steel were represented under contract by the Union. The unit employees were serviced under these contracts by Local 2322 of the Union which existed solely for that purpose. The most recent contract expired by its terms on March 31, 1987.

Having fallen on difficult economic times, it was necessary for Phoenix Steel to cease production and lay off its unit employees on March 31, 1987. At the time of this layoff, the employees were told, and their termination notices reflect, that it was an ''indefinite layoff.'' Plant Manager Ronald Anderson testified that while he suggested that the laid-off employees seek other employment, he was still optimistic that the plant would be purchased and reopened and that they might be reemployed. The plant was maintained during the subsequent shutdown in the hope that it would be purchased and operated as a steel plant. On April 20, 1987, Phoenix Steel entered bankruptcy proceedings pursuant to Chapter 11 of the Bankruptcy Code. Thereafter, several prospective purchasers showed an interest in the property, including Robert Serlin, president of 1st P.S.C. Corporation, the general partner of the limited partnership constituting the

[1] It appears that the distinction between pipe and tube lies in its end use.

Respondent. After operations ceased, Local 2322 continued to hold monthly meetings at which the membership was kept apprised of developments concerning the sale and prospective purchasers, including Serlin. In November 1987, John C. Vogle, the Union's District 7 assistant director, was told by Union Attorney Lynn Saionz that Serlin intended to buy the plant whereupon Vogle arranged a meeting between himself, Saionz, Serlin, and Serlin's attorney, Peter Gold. At that meeting on December 1, 1987, Vogle requested recognition for the Union and asked to negotiate a contract. According to Vogle, Gold responded that if the parties were able to negotiate a contract, the Respondent would recognize the Union.[2] In late December or early January, the Union received a written contract proposal from Respondent. A meeting was held on January 20 in which the proposed contract was discussed. At this meeting, Gold told the Union that it was anticipated that Respondent would hire about 80 employees, some 55 being production and maintenance employees to work on a one-shift operation.

A second meeting was held on January 25, 1988.[3] Anderson explained the Respondent's contract proposal to eliminate some 30 odd job classifications that had existed at Phoenix Steel and substitute three pay grades for pay purposes, to be designated operations, services, and technical. The Union objected, taking the position that the job classifications worked well and should not be changed. The Union asked for and Respondent agreed to provide a proposal to show which job classifications would be assigned to which pay grades.

At the next meeting on January 29, that information was provided and discussed.

At the following meeting on February 2, the Union made a proposal retaining all the Phoenix Steel job classifications, but assigning them to five groups, with a view toward discussing a pay rate for each of the groups. The Company objected to the retention of job classifications, but indicated that it might go to four pay grades. The Union, however, retained the position that it could not agree to substituting pay grades for individual job classifications.

Sometime after February 2, Gold called Vogle and asked for a meeting between Serlin and Jim Smith, an assistant to the president of the Union in Pittsburgh. That meeting took place on February 9. Gold explained the Company's proposal and told Smith that he was disappointed in the Union's attitude. Smith asked some questions about Respondent's proposal and concluded it was deficient and advised Serlin and Gold that the Respondent would have to improve the package for a contract to be negotiated.

On March 23, with the approval of the bankruptcy court, the plant and the real estate pertaining to the production of pipe and tube was sold to Respondent.

Shortly before Respondent began producing steel pipe and tube on May 2, the Union asked for a meeting with Gold and Serlin. At this meeting on April 26, Vogle asked if there was any way the Union could get negotiations ''back on track''; that he would like to negotiate a contract. Gold responded that Respondent was still upset about some of the things they were hearing from Phoenixville about the attitude problems of Local 2322 and that he would get back to them later about ''whether we could get back together in negotiations.''[4]

By letter dated April 29, from John Reck, director, District 7, the Union requested recognition as the exclusive bargaining representative of Respondent's production and maintenance employees, because Respondent would be resuming operations on May 2, with a majority of its work force being union members formerly employed by Phoenix Steel.

By letter dated May 16, 1988, Gold responded that Respondent maintains a ''good faith doubt as to majority status of the United Steelworkers of America . . . supported by objective considerations'' and denied that Respondent was a successor to Phoenixville Steel.

With respect to the matter of successorship, Respondent is a Delaware limited partnership consisting of 1st P.S.C., the general partner, and four limited partners, Blue Pearl Associates, Inc.; Red Linden Corporation; Blue Linden Corporation; and Phoenixville Steel Corporation. 1st P.S.C. owns 42-1/2 percent of Respondent; Blue Pearl owns 32 percent; Red Linden 6-1/2 percent; Blue Linden 3-1/2 percent; and Phoenixville Steel Corporation, a wholly owned subsidiary of Phoenix Steel, owns 15 percent.[5] Ownership of Red Linden is shared equally by Anderson, Respondent's executive vice president and chief operating officer, Louis K. Brown, Respondent's vice president of sales, and Doug Craner, Respondent's tube mill manager. All three held similar positions with Phoenix Steel. Anderson had been plant manager for Phoenix Steel, and his duties are substantially the same with Respondent. The same is true of Craner who had been tube mill manager and Brown who had been vice president for sales. Likewise, Dan Fittro, who had been general foreman of maintenance for Phoenix Steel, became maintenance manager for Respondent with substantially the same duties.

With respect to the opening complement of employees, Respondent was seeking an experienced work force and drew primarily on those previously employed at Phoenix Steel. Forty-eight production and maintenance workers were hired when Respondent began production on May 2. Thirty-eight had been employed by Phoenix Steel at the time the plant closed on March 31, 1987. As of May 16, 41 of the 54 production and maintenance employees had been employed by Phoenix Steel when it shut down. At the time of the hearing, 44 of Respondent's 58 production and maintenance employees were working for Phoenix Steel when it shut down operations.

With respect to supervision, it appears, as noted earlier, that Anderson, Brown, Craner, and Fittro held basically the same supervisory managerial positions with Phoenix Steel as they do now with Respondent. Craner and Fittro report to Anderson, as they had at Phoenix Steel. John Ceianti, Respondent's manager of human resources, serves in that same position with Phoenix Steel. Respondent's eight first-level supervisors are called ''coordinators.'' They report to Fittro and Craner. One of these, Vic Cusco, had been a maintenance supervisor with Phoenix Steel. Of the remaining seven,

[2] Gold did not testify.

[3] All dates refer to 1988 unless otherwise indicated.

[4] On March 31, 1988, a year after Phoenix Steel shut down, the president of the Union removed its officers and placed Local 2322 under an administratorship pursuant to the terms of art. IX of its constitution. Vogle was designated the administrator. It is undisputed that members of Local 2322 have not paid dues since the shutdown on March 31, 1987.

[5] Obviously, this leaves one-half percent unaccounted for but unexplained in the record.

six had been unit employees at Phoenix Steel. It appears that in addition to supervision, coordinators perform some unit work.

Respondent produces steel pipe and tube. These are the same products that had been produced at Phoenix Steel. However, there has been a change in the mix of the product. It appears that 85 percent of the Phoenix Steel production was a carbon-based pipe and tube, a product that does not require heat treating. The remaining 15 percent was an alloy pipe and tube which did require heat treating to improve certain physical properties in the steel. Respondent does not produce heat treated pipe and tube, although it does produce it as ''rolled'' product ready for heat treatment by others. Phoenix Steel used about four employees per shift in heat treatment process. About 25 percent of the pipe and tube produced by Phoenix Steel was light wall pipe and tube (less than one-half inch thick). About 75 percent was heavy wall pipe and tube (more than one-half inch thick). About 99 percent of Respondent's production is heavy wall pipe and tube. Only about 1 percent is light wall pipe and tube.

Respondent uses the same production processes and machinery, except for heat treating and certain special finishing and the machine used for those purposes, as those that Phoenix Steel used to produce pipe and tube. Anderson testified that ''the primary process is virtually identical with the exception of several of our operations that have been eliminated.''

As to customers, with the exception of those customers who purchased light wall and heat-treated alloy pipe and tube, the Respondent sells its products to substantially the same customers as those to whom Phoenix Steel sold its products.

With respect to the utilization of employees, it appears that while job classifications were replaced by four pay groups,[6] those employees formerly employed by Phoenix Steel were utilized in basically the same positions with the Respondent. This was necessarily so as there was no new machinery and the same basic production machinery was used by both Phoenix Steel and the Respondent. However, some production employees perform additional duties for the Respondent which they did not perform for Phoenix Steel. Anderson testified that he anticipates that employees within the four pay groups will become interchangeable, but that at present, until more cross-training can be accomplished, such flexibility is mostly limited to technical group employees. For example, pipefitters do the work previously done by millwrights or welders. Among the production employees, Anderson testified that a cross-training is more prospective and that during the initial stages of the production operation, ''it has been in our best interests to put the best operator doing what he knows best right now. And as time and money allows, there will be cross-training to expand those people into other areas. Not only for the benefit of the company, but also for their own benefit.''

Certain other changes in various working conditions and fringe benefits were introduced by Respondent. Thus, while Respondent's wage rates are now lower, it offers a bonus plan for 6 months for perfect attendance and does not require punching a timecard. Respondent has a 4-day rather than a 5-day 40-hour workweek and a guaranteed 40-hour workweek whereas only 32 hours were guaranteed at Phoenix Steel. Other benefits available at Phoenix Steel were also available to Respondent's employees. These are set out in a booklet called ''Summary of Compensation and Benefits to Our Employees.'' The extent of the benefits vary, but both Respondent and Phoenix Steel offered a health benefit plan, paid vacation, holidays, shift differentials, and a pension plan.

[6] Specialist, technical, operations, and general services.

2. Good-faith doubt based on objective considerations as to majority status

For many years, as noted above, the Union represented Phoenix Steel unit employees under a series of contracts, the most recent expiring on March 31, 1987. It was at that same time that Phoenix Steel laid off its 123 unit employees and closed the plant. When the plant was reopened by Respondent, 13 months later on May 2, 1988, Respondent hired 48 production and maintenance workers, 38 of whom had previously been employed as unit employees with Phoenix Steel.

As a part of the hiring process, all 38 former Phoenix Steel employees were interviewed. Under instructions from Anderson, the interviewers, Ceianti, Fittro, and Craner, were to tell any employee, if the matter was raised, that the Respondent was opening without a union but that they did not know what the future would hold. According to Ceianti, who first interviewed them, the matter was raised by at least nine applicants, although he testified to conversations with only eight. Only Dennis Ubert, Nick Dellaquila, and Charles Evans stated, in effect, that they did not want a union. Enous Moore and Henry Browne were less definitive. Moore states that ''as far as he was concerned he was just as well off without a union than he was with the union, and he preferred it that way''; Henry Browne said that ''he didn't need a union, he didn't feel as though a union did anything for him so why should we have a union, why should he pay dues.'' John Rogala, Claudio Zuniga, and Michael Kucharik variously told Ceianti that it was ''just as well'' not to have a union, that the Union ''didn't do anything,'' and that they did not ''need'' the Union.

After having been interviewed by Ceianti, the employees were interviewed by the department managers. With respect to the technical department, Fittro testified that when the subject of a union came up, he told the employees that there was presently no union but he did not know about the future. The employees' comments varied. Ralph Quay, Joseph Hrubos, and Lloyd Cannon expressed opinions that were inconsistent with any desire for union representation and were, essentially, expressions of rejection. Others like Charles Evans, Kenneth Himes, Wayne Gardner, and Michael Getzey expressed to Fittro the thought that they would be better off without a union; that they did not need a union; did not care if there was a union; and, in Getzey's case, did not want to pay dues because he was retiring in about a year and a half.

After their hiring and before May 16, Fittro testified about daily unsolicited conversations with many technical department employees. Michael McGuigan, who is not a former Phoenix Steel employee, expressed concern for losing his job if the Union came in because, unlike most others, he had not previously been employed by Phoenix Steel as a union member. Evans, Robert Hendricks, Hrubos, Quay, and Cannon all had several conversations with Fittro, all to the effect that

they did not want to be represented by the Union. Taggert said that he did not want a union because he did not want to pay union dues. Himes was somewhat more equivocal, expressing the sentiment that he felt no need for a union and was glad there was none. Gardner said that things were going well without a union; that he saw no need for one and hoped there would not be one. Getzey reiterated his hope that there would be no union because he was close to retirement and did not want to pay union dues.

Craner interviewed operations department employees. Some of them spoke disapprovingly of the Union. These were Willis Foreman, Glenn King, Henry Browne, Larry Bradshaw, Mike Kucharik, Ron Smith, Roger Ceivien, Lauren Biedlar, Ron Denn, and Dennis Ubert. All expressed their dissatisfaction with being represented by the Union. For the most part, they spoke about being glad or happy that there was no union or that they did not need a union or preferred not to have a union. These remarks typified the sentiments of King, Browne, Bradshaw, Kucharik, Ceivien, and Bradshaw. Smith said that he did not care if there was a union or not. Foreman said he was glad Respondent was not union because he wanted to work in a nonunion atmosphere. Denn was more negative, saying that he would not come back if there was a union. Ubert was also opposed, saying that he did not want a union and would do ''whatever it takes to keep the union out of here.''

Anderson was advised by Ceianti, Fittro, and Craner of these conversations. Anderson had some discussions with employees concerning their union sentiments. In conversation with Ubert, he was told that Ubert did not want to work if there was a union. Evans also indicated a strong desire not to have a union as did Hendricks, and both said that these were the feelings of the people in the mill.

In connection with Respondent's assertion of a good-faith doubt, Respondent offered certain newspaper articles dated May 1, attributing to Albert Di Arcangelo, former president of Local 2322, statements critical of the Union, Respondent and the ''scabs'' now working for Respondent. He was critical of the Union for imposing a trusteeship on Local 2322 and the Respondent for discriminatory hiring practices against some former Phoenix Steel employees. Concerning the latter, the articles read, in part:

> If he's mad at the international [sic] Di Arcangelo is furious with former union members who have recently taken jobs at the mill.
>
> People are saying (I'm angry) because I don't have a job. That's not the damn key. The key was the scabs in there today. They're the sons of guns that said to me, ''don't give in, we want our seniority.'' Di Arcangelo said, ''what happened to them. I did what the people said and my own (betrayed) me. They sold me down the river.'' Di Arcangelo said, ''The membership that's in the mill today sold me down the river to fill their own pockets.''

Part of a second article states ''The new operation will start out non union, although there are intentions of organizing the plant, union officials said.''

It also appears, and the parties stipulated, that on May 12, an employee left on Craner's desk a petition bearing the signatures of 34 production and maintenance employees. The petition reads:

> We, the workers at Phoenix Pipe and Tube Company wish to have the *right* to vote for or against a union shop.

B. *Analysis and Conclusions*

1. Successorship

In *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), the Supreme Court adopted the approach taken by the Board and approved by the Court in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), with respect to the issue of determining the matter of successorship between companies. In *Fall River Dyeing* at 43–44, the Court said:

> In *Burns* we approved the approach taken by the Board and accepted by courts with respect to determining whether a new company was indeed the successor to the old. 406 U.S., at 280–281, and n. 4. This approach, which is primarily factual in nature and is based upon the totality of the circumstances of a given situation, requires that the Board focus on whether the new company has ''acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations.'' *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S., at 184. Hence, the focus is on whether there is ''substantial continuity'' between the enterprises. Under this approach, the Board examines a number of factors: Whether the business of both employers is essentially the same; whether employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. See *Burns*, 406 U.S., at 280, n. 4; *Aircraft Magnesium, a Division of Grico Corp.*, 265 N.L.R.B. 1344, 1345 (1982), enf'd, 730 F.2d 767 (CA9 1984); *Premium Foods, Inc*., 260 N.L.R.B. 708, 714 (1982), enf'd, 709 F.2d 623 (CA9 1983).
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> In conducting the analysis, the Board keeps in mind the question whether ''those employees who have been retained will understandably view their job situations as essentially unaltered.'' See *Golden State Bottling Co*., 414 U.S., at 184; *NLRB v. Jeffries Lithograph Co*., 752 F.2d 459, 464 (CA9 1985). This emphasis on the employees' perspective furthers the Act's policy of industrial peace. If the employees find themselves in essentially the same jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest. See *Golden State Bottling Co*., 419 U.S., at 184.[7]

Obviously, a review of these factors is appropriate to the instant case. With respect to the sale, it appears that on March 23, Respondent, with the approval of the Bankruptcy Court, purchased the plant and real estate of Phoenix Steel pertaining to the production of steel pipe and tube and commenced

[7] *Fall River Dyeing*, supra at 43–44.

production on May 2. The parties stipulated that Respondent uses the same production processes and machinery as those used by Phoenix Steel to produce the same products, steel pipe, and tube. While Respondent has eliminated certain minor operations such as heat treating, the major basic item produced, both before and after the purchase, was and is heavy wall pipe and tool. This is virtually all that Respondent is producing and it constitutes 75 percent of Phoenix Steel's production. No new products were manufactured.

With respect to the matter of ownership, there exists partial common ownership since Phoenixville Steel Corporation, one of the limited partners of the Respondent, owns a 15-percent share of the Respondent and is itself a wholly owned subsidiary of Phoenix Steel. In addition, Red Linden, another limited partner with about 6-1/2 percent ownership of Respondent, is owned by three former managers of Phoenix Steel, Ronald Anderson, Louis Brown, and Doug Craner.

Clearly, a substantial majority of Respondent's work force had been employed by Phoenix Steel. At the time Respondent began production on May 2, Respondent employed 48 production and maintenance employees, and 38 of them had been unit employees at Phoenix Steel. On May 16, some 41 of Respondent's production and maintenance employees had been unit enployees at Phoenix Steel.

As to its customers, the parties stipulated that with the exception of those customers who purchased light wall and heat-treated alloy pipe and tube from Phoenix Steel, Respondent sells its product to substantially the same customers as Phoenix Steel.

With respect to Respondent's management and supervision, as set out above, former Phoenix Steel management officials Brown, Anderson, Fittro, and Craner have substantially the same duties with Respondent as they had with Phoenix Steel. Among the first-line supervision at Respondent, six out of eight had previously been employed by Phoenix Steel as unit employees and another, Cusco, had been employed by Phoenix Steel as a supervisor.

Based on the above consideration and a review of the entire record, I am convinced that a totality of the circumstances in this case makes it clear that Respondent was a successor to Phoenix Steel.

Respondent argues that despite the similarities in the operations, Respondent is not a successor to Phoenix Steel because Respondent's employees do not view their job situations as essentially unaltered, because they were told they were on indefinite layoff when Phoenix Steel ceased production; they were advised to seek other employment; the Union went into the trusteeship, the assets of Phoenix Steel were purchased by an unrelated entity; and there had been a 13-month hiatus from the time that Phoenix Steel ceased operations until Respondent resumed production. However, I do not regard these contentions individually or collectively to compel a different conclusion. When Phoenix Steel closed, the employees were laid off ''indefinitely.'' However, it was the expressed hope of management that the plant would reopen and the plant was maintained to facilitate the resumption of operations and the membership was kept advised of the ongoing negotiations for the purchase and, in fact, operations were resumed after the purchase. While it is true that employees were hired without job classifications and paid according to wage groups, the jobs performed by them were not substantially different. Respondent produced the same products on the same machines which were sold to the same customers. While it appears that some employees performed certain tasks in addition to what they had performed at Phoenix Steel and that maintenance employees did some work different from the work normally done by their crafts under the prior contract with Phoenix Steel, these facts are not significant considerations.[8] Similarly, while the employee benefits varied to some extent, both Respondent and Phoenix Steel offered basic fringe benefits, and the fact that the substance of some benefits were different is not a compelling factor.[9] Respondent also cites the 13-month hiatus as evidence that the enployees must have perceived their employment as substantially different. However, I do not view the hiatus here as compelling such a result. Like the Court in *Fall River*, I conclude that the hiatus was not, on balance, a definitive or conclusive event.[10] In evaluating the totality of the circumstances, I conclude that there is a substantial continuity between the enterprises and that Respondent is a successor to Phoenix Steel.[11]

2. Good-faith doubt based on objective considerations as to majority status

Having concluded that Respondent is the lawful successor to Phoenix Steel, it was obligated upon demand to bargain with the Union as the collective-bargaining representative of Respondent's production and maintenance employees. *Fall River Dyeing Corp. v. NLRB*, supra.

The Respondent may rebut this presumption of continuing majority status by showing that it had an objectively based reasonable doubt that the Union continued to represent a majority of its production and maintenance employees. While it appears that an employer may rebut this presumption of majority status with less than actual proof that a majority have rejected union representation, the Board notes that in view of the policies underlying the presumption, ''the employer's burden is a heavy one.''[12] In my opinion, that burden has not been met in the instant case.

Let us turn to those employee comments relied on by Respondent to show good-faith doubt. None of the testimony concerning employee comments came from any of the employees themselves. All the testimony came from Executive Vice President Anderson, Maintenance Manager Fittro, Tube Department Manager Craner, and Human Resources Manager Ceianti. Most of the employees made their antiunion comments only during employment interviews with the managers. While this does not invalidate the testimony, it is obvious that the testimony from the employees themselves would be more persuasive than the recollections of managers about what they were told by some 24 employees.

I also note, in evaluating the content of the comments, that it is necessary for the employees to be expressing in an unequivocal manner their desire to no longer be represented by

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[8] *Cencom of Missouri*, 282 NLRB 253 fn. 1 (1986).

[9] *USG Acoustical Products Co.*, 286 NLRB 1 (1987).

[10] While not a successor case, the Board held in *Sterling Processing Corp.*, 291 NLRB 208 (1988), that an employer who closed its facility for 19 months was obliged to recognize and bargain with the Union when it reopened with substantially the same work force.

[11] That Local 2232 was in administratorship and its members were not paying dues is not significant. The Union remained a viable and legitimate collective-bargaining entity.

[12] *Pennco, Inc.*, 250 NLRB 716, 716–717 (1980), enfd. 684 F.2d 340 (6th Cir. 1982); *Petoskey Geriatric Village*, 295 NLRB 800 (1989).

the Union. *Destileria Serralles, Inc*., 289 NLRB 51 (1988). It is not sufficient that an employee express dissatisfaction with union representation. It is not sufficient that an employee says he does not need union representation. It is not sufficient that an employee be critical of his representation. It is not sufficient to say that he does not care if he is represented or not. It is not sufficient that the employee says he is content without union representation.

First, let us examine the setting in which these antiunion comments were made. The Union had been following the progress of the purchase. The parties had been attemping to negotiate a contract since December and through April 26, with Respondent taking the position that it would recognize the Union if a contract could be negotiated. Negotiations failed because the Union would not accept the Respondent's proposals which included elimination of job classifications and the substitution of four wage groups. In this context, we must evaluate the employment interviews in April. Whenever the subject was raised, the manager conducting the interview made it clear that they were opening nonunion, followed by some observation that the organizational future was uncertain. It is not surprising that employees would conclude, particularly in view of the failed negotiations and the Respondent's implementation of its own contract proposal, that it would be prudent to align his sentiments with the sentiments of the Respondent. It would be naive to expect an employee in those circumstances to express a preference for union representation. Accordingly, even as to those whose comments can be viewed as rejecting union representation, I conclude that such testimony is not probative and I am unwilling to accept it as support of Respondent's assertion of ''reasonable doubt based on objective considerations.''[13]

However, even assuming that such testimony was reliable, having carefully reviewed the record, it appears that only nine employees expressed what I regard as an unequivocal desire that the Union no longer represent them. These were Charles Evans, Dennis Ubert, Ralph Quay, Joseph Hrubos, Lloyd Cannon, Michael McGuigan, Robert Hendricks, Thomas Taggert, and Ron Denn. I note also that all made known their views on more than one occasion and in the case of Evans, Ubert, Hendricks, and Denn, to more than one supervisor. However, even conceding that these nine rejected the Union, the percentage rejecting union representation is not sufficient to support a good-faith doubt based on objective considerations that the Union had lost its majority status. *Louisiana-Pacific Corp*., 283 NLRB 1079 (1987).

Nor can the comments of employees about the union sentiments of other employees be regarded as persuasive. Otherwise, ''a few antiunion employees could provide the basis for withdrawal of recognition when, in fact, there is actually an insufficient basis for doubting the Union's continued majority.'' *Golden State Habilitation Convalescent Center*, 224 NLRB 1618, 1619–1620 (1976).

3. Newspaper articles

Respondent argues, in brief, that ''union officials'' and newspaper articles appearing on May 1 purporting to present the views of the former president of Local 2322 to the effect that Respondent had employed ''scabs'' to the exclusion of himself and former Phoenix Steel employees ''clearly buttressed Respondent's doubts concerning the Union's status among the work force. Such hearsay accounts, however, are simply insufficient as ''objective considerations'' necessary to support any finding that Respondent had a good-faith doubt based on the Union's continuing majority status.

4. The employee petition

As noted above, on May 12, a petition was left on Craner's desk signed by 34 of 58 production and maintenance employees stating their desire to ''vote for or against a union shop.'' Respondent argues that this petition is a clear indication that the employees did not want union representation. I do not agree. The signers were not rejecting union representation, they were simply asking to vote for the purpose of deciding themselves whether they would be represented or not.[14]

In summary, I conclude that the probative evidence adduced by Respondent is insufficient to support its burden of establishing a good-faith doubt based on objective considerations that the Union did not represent a majority of its production and maintenance employees.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent as set forth in section III above, in connection with the Respondent's operations described in section I above, have a close and intimate relationship to traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and from infringing in any like or related manner on its employees' Section 7 rights and that it take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by Respondent at its plant in Phoenixville, Pennsylvania, excluding salaried employees, watchmen, guards, confidential employees, clerical employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By refusing on or after May 16, 1988, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, Respondent has en-

[13] *Middleboro Fire Apparatus*, 234 NLRB 888, 894 (1978).

[14] The term ''union shop'' as used in the petition creates some ambiguity as to whether the petitioning employees were referring to a vote on union representation or a vote on an agreement for compulsory union membership after 30 days of employment, as provided in Sec. 8(a)(3) of the Act. However, the intent of the petition is immaterial because, in either case, no petition simply for a vote can be construed as a rejection of the Union as the employees' collective-bargaining representative.

gaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Phoenix Pipe & Tube, L.P. d/b/a Phoenix Pipe and Tube Company, a partnership composed of 1st P.S.C. Corporation, Blue Pearl Associates, Inc., Red Linden Corporation, Blue Linden Corporation and Phoenixville Steel Corporation, Phoenixville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Steelworkers of America, AFL–CIO, CLC as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees employed by the Employer at its plant in Phoenixville, Pennsylvania, excluding salaried employees, watchmen, guards, confidential employees, clericals and supervisors as defined in the Act.

(b) Post at its Phoenixville, Pennsylvania facility copies of the attached notice marked ''Appendix.''[16] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Steelworkers of America, AFL–CIO, CLC as the exclusive bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

> All production and maintenance employees employed at the Phoenixville, Pennsylvania plant, excluding salaried employees, watchmen, guards, confidential employees, clericals and supervisors as defined in the Act.

> PHOENIX PIPE TUBE, L.P. D/B/A PHOENIX PIPE AND TUBE COMPANY, A PARTNERSHIP COMPOSED OF 1ST P.S.C. CORPORATION, BLUE PEARL ASSOCIATES, INC., RED LINDEN CORPORATION, BLUE LINDEN CORPORATION AND PHOENIXVILLE STEEL CORPORATION

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''